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No. 80-1910

In the Supreme Court of the United States

OCTOBER TERM, 1980

ORLANDO VASQUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, in the circumstances of this case, exigent circumstances justified the warrantless entry into an apartment and the seizure of evidence in plain view.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-55a) is reported at 638 F.2d 507. The opinion of the district court (Pet. App. 56a-61a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 29, 1980. A petition for rehearing was denied on March 5, 1981. The petition for a writ of certiorari was filed as of May 4, 1981. The jurisdic-

tion of this Court is invoked under 28 U.S.C. 1254 (1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of conspiring to possess cocaine with intent to distribute, in violation of 21 U.S.C. 846, and of the underlying substantive offense, in violation of 21 U.S.C. 841(a)(1) (Pet. App. 3a).[1] He was sentenced to two consecutive prison terms of 15 years and a special parole term of ten years (*id.* at 53a).[2]

1. The evidence adduced at the suppression hearing is detailed in the opinion below (Pet. App. 4a-17a). It showed that in March 1979 members of the New York Drug Enforcement Task Force searched the apartment of a suspected cocaine dealer and seized a pound of cocaine, together with documents thought to be records of his narcotics operation. Among these documents were a customer list identifying "Amparo" as a substantial cocaine purchaser and an address book listing her address and telephone number. Task Force agents concluded, therefore, that Amparo Medina was one of the dealer's

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[1] Petitioner's co-defendants—Carlos Sanchez, Fernando Medina, Amparo Medina, Clara Mesa and Hernando Mesa—all pleaded guilty to charges of possession of cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1), reserving the right to appeal the denial of their suppression motions (Pet. App. 3a).

[2] The court of appeals vacated and remanded petitioner's sentence for clarification of whether its severity had been based on the erroneous assumption that the jury had found that petitioner had played a leadership role in the conspiracy (Pet. App. 53a-54a).

major customers, and they began to monitor her activities (Pet. App. 5a).

On November 29, 1979, Task Force agents established a surveillance of Amparo Medina's residence (Pet. App. 6a). The agents saw Amparo and petitioner leave her house by car at approximately 5:00 p.m. and arrive at a four-story building located at 633 Grand Street in Brooklyn (*ibid.*). At approximately 8:00 p.m., two agents saw Hernando and Clara Mesa come out of 633 Grand Street and drive off in their car. The agents stopped the Mesas after observing their apparent attempts to avoid surveillance (*id.* at 5a). The agents identified themselves and asked the Mesas to get out of the car, but Hernando reached under the car's front seat and remained in that position for some 30-45 seconds before complying with the order (*id.* at 8a). When Hernando finally stepped out of the car, the agent reached under the seat and retrieved a cigarette carton, which contained more than half a pound of cocaine (*ibid.*). During a subsequent inventory search of the Mesas' car, an agent found a photograph of a group that included petitioners, Hernando Mesa, Fernando Medina and Amparo Medina.

Within an hour of the Mesas' arrest, Task Force members in Queens arrested Fernando Medina, the husband of Amparo, and seized a bag containing approximately one pound of cocaine (Pet. App. 4a). Fernando was then taken to his home, where Amparo was arrested (*ibid.*). Shortly after Fernando's arrest, other Task Force members arrested Carlos Sanchez, after he left 633 Grand Street, and seized a bag containing a pound of cocaine (*ibid.*). After arresting Sanchez, Task Force agents again resumed surveillance of 633 Grand Street and observed Dora

Wright, the owner of the building, enter. The agents then saw three men come out of 633 Grand Street and look cautiously up and down the block (Pet. App. 12a-13a). The three men separated upon leaving the building, and then rejoined and began to walk together (*id.* at 13a). When the agents approached them, they again began to separate. The agents stopped them and asked what apartment they had just left (*ibid.*). They replied that they had visited a woman living in a second floor apartment, but they did not give her name. One of the men, Jaramillo, agreed to accompany the agents to that apartment.

As several agents and Jaramillo walked towards 633 Grand Street, they saw petitioner and another man leave the building. One of the officers, who had previously arrested both of these men on charges of distributing cocaine, recognized them as major narcotics dealers (Pet. App. 13a). The agent ordered the men to halt, but instead they walked quickly away. The agents pursued and arrested them (*ibid.*).

Several agents and Jaramillo then went to the second floor apartment at 633 Grand Street. Jaramillo knocked at the door, and Dora Wright answered in Spanish. Jaramillo replied in Spanish, and Wright opened the door. As the agents entered, Wright told them that Jaramillo had just asked her to say that they had been together earlier, but that this was not true. Wright added that throughout the day Jaramillo and others had been in and out of the fourth floor apartment, which she had rented to a man named Orlando for himself, his brother and a friend (Pet. App. 14a). The agents then checked Wright's apartment to assure themselves that it was not used in the narcotics operation. This process took several minutes to complete and "caused much com-

motion" (Pet. App. 14a & n.5). Thereafter, the agents decided to enter the fourth floor apartment, reasoning that by then its occupants were probably aware of their presence in the building and would be likely to destroy evidence (*id.* at 14a).

The agents entered the fourth floor apartment using a key given to them by Wright. The agents entered each room to check for suspects and in the process seized a series of items: (1) clear plastic bags containing a white powdery substance from an open plastic garbage bag and an open traveling bag, both found inside an open foyer closet; (2) a pound of cocaine, a triple beam scale, and a large piece of glass covered with cocaine residue, all of which were in plain view; (3) 16 bottles of Mannitol, two strainers, assorted boxes of plastic bags, a set of weights and a scale, all found in an open box lying inside a metal cabinet; (4) documents in an open metal box; and (5) a pistol found under a mattress. The agents completed their inspection of the apartment in a few minutes, but remained there for 16 hours (Pet. App. 14a-15a).

Petitioner moved the district court to suppress all evidence seized in the fourth-floor apartment. The court denied the motion as to items found by the agents in plain view during the initial, cursory inspection of the apartment (Pet. App. 56a-61a). It reasoned that the agents had ample cause to believe that illegal activities were being conducted on the upper floors of 633 Grand Street (*id.* at 60a). Accordingly, it found that the agents "could understandably believe that additional evidence was present in the apartment which was capable of being destroyed," and in view of time constraints, "their decision not to delay for the purpose of obtaining a search warrant was justified" (*id.* at 60a-61a). The

court concluded, however, that "once the officers entered the apartment and made a cursory examination to determine whether any persons were present their searching activities should have ceased" (Pet. App. 61a). Accordingly, it suppressed as fruits of a "thorough search" the items seized from the metal cabinet, the documents found in the metal box, and the pistol (*ibid.*). The court of appeals affirmed (Pet. App. 44a-50a), reasoning that the district court's finding that the agents had reasonable grounds to believe that evidence in the apartment might be destroyed was not clearly erroneous and that this belief justified a security check and the seizure of items in plain view (*id.* at 49a-50a).

ARGUMENT

Petitioner contends (Pet. 8-19) that the agents' entry into the fourth-floor apartment and seizure of the items in plain view violated the Fourth Amendment. This contention is without merit. Moreover, because it raises only the issue whether the courts below correctly found exigent circumstances on the facts of this case, it does not warrant review by this Court.

As a general rule, of course, the Fourth Amendment prohibits police from entering a home to conduct a search or make an arrest without a warrant. See, *e.g.*, *Steagald* v. *United States*, No. 79-6777 (Apr. 21, 1981); *Payton* v. *New York*, 445 U.S. 573 (1980). Where the circumstances manifest a compelling need for official action, however, and there is no time to secure a warrant, entry into a home can meet the reasonableness standard of the Fourth Amendment. See *Michigan* v. *Tyler*, 436 U.S. 499, 509 (1978); *Warden* v. *Hayden*, 387 U.S. 294, 298-299 (1967). And this Court has noted that the ne-

cessity to prevent the imminent destruction of evidence may be an exigent circumstance that can justify such an entry. See *United States* v. *Santana*, 427 U.S. 38, 43 (1976); *Vale* v. *Louisiana*, 399 U.S. 30, 35 (1970); *Johnson* v. *United States*, 333 U.S. 10, 15 (1948).

Petitioner does not dispute the general principle that a cursory search to check for persons who may destroy evidence is appropriate in some circumstances (Pet. 9). He objects that the court of appeals misapplied that principle on the facts of this case. In our view, however, the court of appeals correctly concluded (Pet. App. 44a-50a) that here a limited search to prevent the destruction of evidence was reasonable under the Fourth Amendment. Contrary to petitioner's contention (Pet. 11-12), the agents did not rely on a "speculative possibility" that evidence might be destroyed, but rather had strong reason to believe that there were people in the apartment likely to destroy contraband and other evidence. Shortly before the entry, the agents had arrested individuals coming out of 633 Grand Street with cocaine in their possession. Two of those arrested, Jaramillo and Parra, tried to divert the agents' attention from the fourth floor by stating that they had come from an apartment on the second floor. However, Wright, the occupant of the second floor apartment, revealed to the agents Jaramillo's request in Spanish that she corroborate his misdirection. Wright also told the agents that the apartment was occupied by "Orlando," his brother, and a friend (Pet. App. 14a).[3] In addition, the very light clothing worn by

[3] This information was significant because the agents had just arrested petitioner, whose first name is Orlando and whom they knew to be a narcotics dealer.

Jaramillo [4] and the fact that he had no keys in his possession when he was arrested, together with Wright's statement that Jaramillo had come from the fourth-floor apartment, strongly suggested that there was someone in that apartment who would readmit Jaramillo (see Pet. App. 49a). There was reason to believe that the occupants of the fourth floor apartment knew of the agents' presence in the vicinity—both because several of the arrests had been made in front of the building and because the noise that resulted from the entry into Wright's apartment would have been audible above (*ibid.*). Thus, the agents had strong reason to fear that evidence would be destroyed in the fourth floor apartment if they did not enter.

These circumstances authorized the agents to enter the fourth floor apartment to determine if it was occupied, in order to prevent any occupant from destroying the contraband that the agents had probable cause to believe was present. The agents were also justified in conducting a quick check of the rooms to detect anyone who might attack them or destroy evidence. See *United States* v. *Agapito*, 620 F.2d 324, 336 & n.18 (2d Cir.), cert. denied, No. 79-1923 (Oct. 6, 1980). See also *United States* v. *Gardner*, 627 F.2d 906, 909-912 (9th Cir. 1980); *United States* v. *Baker*, 577 F.2d 1147, 1152 (4th Cir.), cert. denied, 439 U.S. 850 (1978); *United States* v. *Bowdach*, 561 F.2d 1160, 1168-1169 (5th Cir. 1977).

Since the entry for this limited purpose was lawful, the evidence discovered in plain view in the course of the entry was admissible. See, *e.g.*,

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[4] The court of appeals noted (Pet. App. 48a-49a) that November 29, 1979, had been a cold evening. Yet Jaramillo was wearing only a shirt, pants and slippers with no socks at the time of his arrest (*ibid.*).

Mincey v. *Arizona*, 437 U.S. 385, 393 (1978); *Michigan* v. *Tyler*, 436 U.S. 499, 509-510 (1978); *Coolidge* v. *New Hampshire*, 403 U.S. 443, 465-466 (1971). Petitioner correctly notes (Pet. 15) that some of the agents' conduct inside the apartment—specifically, the thoroughness of the search and the fact that the agents remained in the apartment for a substantial period of time—exceeded the scope of activities reasonably warranted by the exigent circumstances. The proper remedy for this Fourth Amendment violation is suppression of that evidence seized as a result of the violation, which was ordered by the district court (Pet. App. 61a). However, the fact that the agents' conduct in some respects violated the Fourth Amendment provides no basis for suppressing the evidence discovered in plain view during a lawful search, which was in no way the fruit of any illegality. See *Wong Sun* v. *United States*, 371 U.S. 471 (1963); *Elkins* v. *United States*, 364 U.S. 206, 223 (1960).[5]

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[5] Petitioner also disputes the findings of the court below (Pet. App. 50a) that the agents entered the apartment in order to conduct a lawful security search, contending that their intent was to conduct a more thorough, illegal search. In our view, the court of appeals correctly refused to find on appeal that the agents had such an illegal intent. In any event, the subjective intent of the agents provides no basis for suppressing evidence obtained as a result of lawful actions. *Scott* v. *United States*, 436 U.S. 128, 136-137 (1978).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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